June 7, 2018

VIA ELECTRONIC FILING

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: *In the Matter of Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Development*, WT Docket No. 17-79; *In the Matter of Comment Sought on Streamlining Deployment of Small Cell Infrastructure by Improving Wireless Facilities Siting Policies; Mobilitie, LLC Petition for Declaratory Ruling*, WT Docket No. 16-421

Dear Ms. Dortch:

Pursuant to Section 1.1206 of the Commission's rules,[1] Crown Castle hereby submits these *ex parte* comments regarding the FCC's authority to issue regulations promoting the rapid deployment of next generation wireless networks through streamlining the deployment of network infrastructure, pursuant to Sections 253 and 332 of the Communications Act.

Crown Castle is at the forefront of our country's broadband revolution, deploying fiber optic and wireless infrastructure and developing the small cell networks[2] that will serve as the backbone for the broadband networks of the future. With more than 40,000 towers, 60,000 small cells constructed or under contract, and over 60,000 miles of fiber, Crown Castle is the country's largest independent owner and operator of shared wireless infrastructure. Notably, Crown Castle does not hold commercial mobile radio service ("CMRS") licenses, and does not itself provide personal wireless services; rather its network offerings are predominantly wireline. Utilizing its fiber networks, Crown Castle provides (among other service offerings) wholesale wireline transport services to its wireless carrier customers.[3] These fiber networks provide the necessary

[1] 47 C.F.R. § 1.1206.

[2] Except as otherwise specified, the term "small cell" as used herein includes both small cells and distributed antenna systems ("DAS").

[3] Crown Castle entities currently hold utility certifications in 47 states, the District of Columbia, and Puerto Rico. In all of these jurisdictions, utility commissions have issued Crown Castle entities certificates to provide its wholesale transport services. However, the status of these service offerings has recently come into question in Texas and Pennsylvania. *See Complaint of Extenet Network Sys., Inc. Against the City of Houston for Imposition of Fees for Use of Public Right of Way*, Proposal for Decision, SOAH Docket No. 473-16-1861, PUC Docket No. 45280 (Tex/ State Office of Admin. Hearings Feb. 24, 2017), attached to Crown Castle's initial comments as Exhibit A (finding that unswitched point-to-point transport service to retail CMRS

carriage of the signals to and from radios used by the wireless carrier customers in a manner often referred to as "wireless backhaul." These service offerings are a key component to every small cell deployment, and thus Crown Castle and other network providers like it are a critical piece of this country's broadband ecosystem, supporting the deployment of next-generation wireless services.

Crown Castle has worked cooperatively with many jurisdictions and has successfully deployed small cell networks in hundreds of places, taking advantage of densification to boost network capacity and throughput and provide millions of Americans with access to networks that are ready to meet the needs of an increasingly wireless future. The number of small cell deployments is expected to grow exponentially—carriers plan to install "hundreds of thousands of new small cells" around the country over the next few years.[4] Indeed, cities such as Cincinnati, Chicago, Pittsburgh, Minneapolis and the Louisville-Jefferson County Metro Government, along with smaller jurisdictions such as State College, Pennsylvania, Brookfield, Wisconsin, Little Elm, Texas, The Colony, Texas, and Texas City, Texas, have already facilitated the deployment of these networks to bring these services to their residents.

While Crown Castle's successful partnerships in many cities have allowed broadband networks to flourish, some jurisdictions have created obstacles to the deployment of next-generation wireless systems in the public right-of-way ("ROW"). A number of jurisdictions impose unreasonable fees and conditions on wireless facilities that are particularly inappropriate in the context of small cells, which are a fraction of the size of macro towers and typically have minimal impact on the surrounding area. The fees in particular, which lack any rational relation to the cost of approving applications or maintaining the ROW, can make deploying networks to serve consumers and businesses in these jurisdictions cost prohibitive. Even where the fees do not result in a direct lack of service in a high-demand area like a city or urban core, the high cost of building and operating facilities in these jurisdictions consume capital and revenue that could otherwise be used to expand wireless infrastructure in higher cost areas. This impact of egregious fees is prohibitory, and should be taken into account in any prohibition analysis.

Other jurisdictions, meanwhile, discriminate against wireless installations in the ROW. These jurisdictions apply one set of rules to installations of wireline facilities, while holding infrastructure used for wireless services to a much different and higher standard. In some cases, jurisdictions apply zoning rules to small cells in the right of way while permitting wireline

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providers is not a wireless service); *but see Review of Issues Relating to Commission Certification of Distributed Antennae System Providers in Pennsylvania*, Motion of Robert W. Powelson, 2517831-LAW, Docket No. M-2016-2517831 (Penn. PUC Mar. 2, 2017), attached to Crown Castle's initial comments as Exhibit B (finding that that the FCC's regulatory classification of DAS "as 'personal wireless service' is persuasive" and that DAS networks should no longer be deemed utilities under Pennsylvania law because they are deemed CMRS facilities). A recent decision by the Commonwealth Court of Pennsylvania reversed the PUC's orders, finding that Crown Castle's DAS operations qualified it as a public utility. *Crown Castle NG East LLC v. Pennsylvania Public Utility Commission*, No. 697 C.D. 2017 (June 7, 2018), attached hereto as Attachment 1.

[4] Comments of CTIA, WT Docket No. 16-421 at 2 (filed Mar. 8, 2017).

facilities with similar or even greater impact to proceed without any discretionary review. These discriminatory practices are inconsistent with the language and intent of the Communications Act, and have the effect of stifling competition and slowing broadband deployment.

Finally, in some cases, municipalities have unjustifiably prohibited installations of equipment to facilitate wireless telecommunications or imposed moratoria that have the effect of prohibiting wireless small cell installations in the public ROW. These are the simplest and most direct forms of prohibition.

As Crown Castle and others have said already in the record, the FCC has ample authority to issue regulations addressing these barriers to wireless infrastructure deployment under Sections 253 and 332. Crown Castle provides the following analysis in order to underline the Commission's power to take action in this area.

I. BACKGROUND

In the more than twenty years since Congress adopted the Telecommunications Act of 1996 (the "1996 Act"), Congress and the FCC have repeatedly taken action to refine the laws and regulations governing deployment of telecommunications facilities. These efforts have been driven both by changes in technology and by a recognition that there continue to be concerns about state and local governments throwing up barriers to wireless and wireline facility deployment.

A. Statutory and Regulatory Background

As the FCC and the courts have recognized, the 1996 Act advanced a central goal of "promot[ing] competition and reduc[ing] regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies."[5] Section 706 of the 1996 Act establishes as a national policy "the deployment on a reasonable and timely basis" of broadband to all Americans, and directs the Commission to use "regulatory methods that remove barriers to infrastructure investment."[6] Section 253 of the 1996 Act contains provisions removing barriers to entry in the provision of telecommunications services, and empowering the Commission to take

[5] Preamble, Telecommunications Act of 1996, P.L. 104-104, 100 Stat. 56 (1996); *see also In Re 2002 Biennial Regulatory Review*, Report, 18 FCC Rcd. 4726 ¶ 5 (2003) ("[T]he overarching goal of the reforms in the 1996 Act was to promote competition in the communications industry"); *see also In Re Year 2000 Biennial Regulatory Review-Amendment of Part 22 of Commission's Rules to Modify or Eliminate Outdated Rules Affecting Cellular Radiotelephone Serv. & Other Commercial Mobile Radio Servs.*, Second Report and Order, 17 FCC Rcd. 18485 ¶ 6. (2002); *AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 371 (1999) (the 1996 Act "fundamentally restructures local telephone markets" to facilitate market entry); *Reno v. American Civil Liberties Union*, 521 U.S. 844, 857-58 (1997) ("The Telecommunications Act was an unusually important legislative enactment ... designed to promote competition").

[6] 47 U.S.C. § 1302(a).

further steps in this regard.[7] Section 253(a) of the 1996 Act provides that "[n]o State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service."[8] Section 253(d) directs the Commission to preempt any State or local statute, regulation, or legal requirement that it determines, after notice and an opportunity for public comment, violates Section 253(a).[9]

Although titled "Preservation of Local Zoning Authority," Section 332(c)(7) of the 1996 Act extends beyond zoning, addressing "the authority of a State or local government . . . over decisions regarding the placement, construction, and modification of personal wireless service facilities."[10] Clause (B) provides that "[t]he regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof—(I) shall not unreasonably discriminate among providers of functionally equivalent services; and (II) shall not prohibit or have the effect of prohibiting the provision of personal wireless services."[11]

In 2009, the Commission issued a Declaratory Ruling to address concerns about delays and other impediments to the approval of requests for wireless towers or antenna sites.[12] The FCC found that the record showed "that unreasonable delays are occurring in a significant number of cases," including 760 applications that had been pending for over a year.[13] The Commission further determined that "unreasonable delays in the personal wireless service facility siting applications process have obstructed the provision of wireless services."[14] At the time, the FCC was particularly concerned about expanding coverage of wireless facilities, explaining that "[d]elays in the processing of personal wireless service facility siting applications are particularly problematic as consumers await the deployment of advanced wireless communications services, including broadband services, in all geographic areas in a timely fashion."[15] To address these concerns, the Commission interpreted the statutory requirement that jurisdictions act within a "reasonable period of time" as requiring a "shot clock," pursuant to which state and local

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[7] *Id.* § 253.

[8] *Id.* § 253(a).

[9] *Id.* § 253(d).

[10] *Id.* § 332(c)(7).

[11] *Id.* § 332(c)(7)(B)(i).

[12] *In the Matter of Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review and to Preempt Under Section 253 State and Local Ordinances That Classify All Wireless Siting Proposals As Requiring a Variance*, Declaratory Ruling, 24 FCC Rcd. 13994 (2009) ("*2009 Declaratory Ruling*").

[13] *Id.* ¶ 33.

[14] *Id.* ¶ 34.

[15] *Id.* ¶ 35.

government are required to process collocation applications within 90 days and other applications within 150 days.[16]

The *2009 Declaratory Ruling* also addressed concerns about competition, finding that "a State or local government that denies an application for personal wireless service facilities siting solely because 'one or more carriers serve a given geographic market' has engaged in unlawful regulation that 'prohibits or ha[s] the effect of prohibiting the provision of personal wireless services,' within the meaning of Section 332(c)(7)(B)(i)(II)."[17]

In 2012, concerned that state and local jurisdictions were still erecting roadblocks to wireless deployment, Congress adopted Section 6409 of the Middle Class Tax Relief and Job Creation Act, more commonly known as the Spectrum Act, to "promote the deployment of the network facilities needed to provide broadband wireless services."[18] Subsection (a)(1) provides that "[n]ot withstanding section 704 of the Telecommunications Act of 1996 [codified as 47 U.S.C. § 332(c)(7)] or any other provision of law, a State or local government may not deny, and shall approve, any eligible facilities request for a modification of an existing wireless tower or base station that does not substantially change the physical dimensions of such tower or base station."[19] Subsection (a)(2) defines the term "eligible facilities request" as any request for modification of an existing wireless tower or base station that involves (a) collocation of new transmission equipment; (b) removal of transmission equipment; or (c) replacement of transmission equipment.[20]

The Commission launched a proceeding to implement Section 6409, and determined that ambiguities in the language of the Spectrum Act had the potential to undermine the goals of advancing wireless broadband service.[21] Accordingly, the Commission adopted rules to expedite the processing of eligible facilities requests, including acceptable documentation requirements and a 60-day period for states and localities to review eligible facilities requests.[22] Furthermore, the Commission determined that for the purpose of the statute a "deemed granted" remedy was required for cases in which the reviewing authority fails to issue a decision within 60 days.[23] The

[16] *Id.* ¶¶ 44-45.

[17] *Id.* ¶ 56.

[18] *In the Matter of Acceleration of Broadband Deployment By Improving Wireless Facilities Siting Policies*, Report & Order, 29 FCC Rcd. 12865 ¶ 137 (2014) ("*2014 Infrastructure Order*").

[19] Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96 § 6409(a)(1), 126 Stat. 156 (2012) ("Spectrum Act").

[20] *Id.* § 6409(a)(2).

[21] *2014 Infrastructure Order* ¶ 135.

[22] *Id.* ¶ 214-15.

[23] *Id.* ¶ 226.

agency found that a deemed granted remedy would fulfill the important mission of "ensuring rapid deployment of commercial and public safety wireless broadband services."[24]

B. Delays in Approvals of Wireless Infrastructure Threaten to Disrupt the Nation's Transition to 5G

The arrival of next-generation wireless broadband networks has the potential to revolutionize the way Americans communicate, whether person-to-person, person-to-machine, or machine-to-machine. According to the FCC's most recent wireless competition report, demand for wireless services has never been greater. From 2015 to 2016, the total number of mobile wireless subscriber connections grew by approximately five percent, from 378 million to 396 million.[25] In addition, the amount of wireless data consumed in 2016 reached 13.7 trillion MB, an increase of approximately 42 percent from 9.6 trillion MB in 2015, and an increase of approximately 238 percent from the 4.1 trillion MB reported in 2014.[26]

5G wireless services will continue the transformation of the U.S. economy through increased use of high-bandwidth applications, expanded capacity of wireless communications, and the realization and growth of the Internet of Things.[27] While our country's existing wireless infrastructure was first built using macrocells, with relatively large antennas mounted on towers, as usage has grown and capacity needs have exploded, these networks have increasingly also required the deployment of small cell systems and fiber transport. This is a trend that will only increase with next-generation networks, as demand continues to accelerate and 5G services are deployed around the country. As the Commission properly has recognized, "[b]ecause providers will need to deploy large numbers of wireless cell sites to meet the country's wireless broadband needs and implement next-generation technologies, there is an urgent need to remove any unnecessary barriers to such deployment, whether caused by Federal law, Commission processes, local and State reviews, or otherwise."[28]

Crown Castle is at the forefront of efforts to improve spectrum utilization through network densification. Over the past several years, Crown Castle has invested more than $15 billion in small cell and fiber networks. Crown Castle builds telecommunications networks that allow this massive increase in data to flow from the wireless node back to its destination, and vice versa. The company has deployed and is currently working to deploy small cell networks in New York

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[24] *Id.* ¶ 228.

[25] *See In the Matter of Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993*, Twentieth Report, 32 FCC Rcd. 8968 ¶ 5 (2017).

[26] *See id.* (citing CTIA Wireless Industry Indices Year-End 2016, at 96. Appendix I: Trends in Consumer Usage, Chart 1 shows annual minutes, messages, and megabytes of wireless traffic from 2008 through 2016).

[27] *See In the Matter of Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, Notice of Proposed Rulemaking and Notice of Inquiry, 32 FCC Rcd. 3330 ¶ 1 (2017).

[28] *Id.* ¶ 2.

City, Philadelphia, Atlanta, Miami, New Orleans, Houston, Nashville, Chicago, Vail, Scottsdale, Los Angeles, San Francisco, Seattle, and many other cities across the country.

Unfortunately, Crown Castle frequently faces resistance from state and local governments that inhibits its ability to deploy the facilities necessary to provide telecommunications services that support next-generation broadband networks.[29] This resistance is particularly acute when it comes to locating telecommunications networks in the public ROW—an issue that is increasingly critical for 5G deployment. Many municipalities charge fees to access the ROW that are completely unrelated to their maintenance or management, and instead serve merely to increase government revenues. Such fees are per se excessive and unreasonable, and serve as little more than a stealth user fee for broadband services. Still other municipalities discriminate by erecting barriers that make it difficult for independent network and telecommunications service providers to deploy next-generation broadband networks in public ROW, for example by restricting access to the ROW only to providers of commercial mobile services or applying onerous zoning requirements on small cell installations when other similar ROW utility installations are erected with simple building permits. Left unaddressed, these impediments challenge the United States' role as a leader in delivering broadband services.

The records in both this proceeding and the complementary proceeding before the Wireline Competition Bureau[30] are replete with examples of the imposition of unreasonable fees and review procedures precluding the deployment of infrastructure to support advanced wireless services. Many municipalities impose unreasonable fees on the placement and operation of infrastructure to support wireless networks that are completely unrelated to the cost of reviewing applications or maintaining the ROW. Commenters to the wireless infrastructure proceeding chronicled excessive application and permit fees,[31] right-of-way usage fees,[32] municipal structure attachment fees,[33] and gross-revenue fees.[34] Municipalities have adopted or applied a range of overly restrictive requirements that actually or have the effect of prohibiting the provision of wireless services.[35] The Township of Upper St. Clair, Pennsylvania, for example, passed an ordinance in 2015 requiring a zoning application to place small cells in the public ROW,

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[29] *See* Comments of Crown Castle, WT Docket Nos. 17-79 (June 15, 2017) at 6-7 ("Crown Castle Comments").

[30] *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WC Docket No. 17-84.

[31] Comments of Nokia, WT Docket No. 17-79 at 9 (filed June 15, 2017).

[32] Comments of Mobilitie, WT Docket No. 17-79, WC Docket No. 17-84 at 5 (filed June 15, 2017).

[33] Comments of Verizon, WT Docket No. 17-79 at 6-7 (filed June 15, 2017).

[34] Crown Castle Comments at 12.

[35] *See, e.g.* Comments of AT&T, WT Docket No. 17-79 at 14-17 (filed June 15, 2017) (describing how above-ground facility prohibitions, location prohibitions, and unreasonable aesthetic restrictions materially inhibit or limit the ability to provide telecommunications service) ("AT&T Comments"); Comments of the Computer & Communications Industry Association, WT Docket No. 17-79 at 12-15 (filed June 15, 2017) (providing examples of siting constraints that have had the effect of prohibiting the provision of telecommunications service).

blocking small cell deployment in approximately 80% of the Township's land area.[36] Many nearby municipalities have adopted nearly identical versions of this regulation.[37] The Commission should act now to clarify the broad scope of its authority under Sections 253 and 332 and rein in municipal conduct which negatively impacts delivery of advanced services to American consumers.

II. THE PLAIN LANGUAGE OF SECTION 253 BROADLY PREEMPTS STATE AND LOCAL ORDINANCES, REGULATIONS, AND LEGAL REQUIREMENTS THAT PROHIBIT OR HAVE THE EFFECT OF PROHIBITING TELECOMMUNICATIONS SERVICE

The language of Section 253 is sweeping in scope and broadly prohibits any state law, regulation, or other "legal requirement" that prohibits or has the effect of prohibiting the ability of a telecommunications carrier to provide any telecommunications service. Consistent with the structure of Section 253, the Commission has determined that it may find a local law or legal requirement runs afoul of Section 253 whenever the agency: (1) determines that "the challenged law, regulation or legal requirement violates the terms of section 253(a) standing alone"; and (2) it is not otherwise permissible under section 253(b) or 253(c).[38] Section 253(a) is a far-reaching prohibition on harmful state or local action while Sections 253(b) and (c) are narrow exceptions.[39] As discussed below, the Commission should exercise its broad authority under Section 253 to preempt unduly onerous state and local action which impedes the provision of telecommunications service. The proper standard for evaluating whether state and local action is preempted is whether it will "materially inhibit" the provision of services. And Section 253's use of the term "legal requirement" should be interpreted expansively, to capture all the various ways that a state or locality can hamper efficient infrastructure deployment. These reforms will address the core issues slowing broadband deployment today.

A. The Commission Has Ample Authority to Interpret Section 253

As the agency charged with administering the Communications Act, the FCC has the authority to interpret any ambiguous statutory language in the Act, and to enact implementing regulations that clarify and specify the effect of the Act. Congress gave the Commission wide latitude in how to implement the Communications Act,[40] and this latitude extends to interpreting statutory

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[36] *See* Crown Castle Comments at 9.

[37] *See id.*

[38] *Pub. Util. Commission of Texas*, Memorandum Opinion and Order, 13 FCC Rcd. 3460 ¶ 42 (1997) ("*Texas PUC*").

[39] *See, e.g. Sandwich Isles Communications, Inc., Petition for Waiver of the Definition of "Study Area" Contained in Part 36, Appendix-Glossary and Sections 36.611 and 69.2(hh) of the Commission's Rules*, Memorandum Opinion and Order, 32 FCC Rcd. 5878 ¶ 25 (2017); *Texas PUC* ¶ 43.

[40] *See* 47 U.S.C. § 201(b) ("The Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this chapter."); *City of Arlington,*

ambiguities. "Congress need not, and likely cannot, anticipate all circumstances in which a general policy must be given specific effect."[41] The presumption is that "Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency."[42] Indeed, the Supreme Court has found that "Congress knows to speak in plain terms when it wishes to circumscribe, and in capacious terms when it wishes to enlarge, agency discretion."[43]

The Commission can and should draw upon its special expertise to give effect to provisions such as Section 253. Such agency interpretations of an ambiguous statute are especially appropriate where the subject matter is "technical, complex, and dynamic," as it is the telecommunications space.[44] The Supreme Court has recognized that courts should respect agency constructions of ambiguous statutes "because of the agency's greater familiarity with the ever-changing facts and circumstances surrounding the subjects regulated."[45] Here, the Commission has developed a fulsome record on infrastructure deployment and its interpretations of Section 253 have accounted for changes in the industry and the nature of wireless technology deployment in the over twenty years of the statute's existence.

The Commission's extensive engagement with these issues places it in a unique position to identify what state and local laws and regulations will "have the effect of prohibiting" wireless services. The Commission is well suited to understand how the industry has evolved since the adoption of Section 253 in 1996 and predict what actions are likely to interfere with the provision of telecommunications services going forward. Given the coming need for extensive small cell installations, it is appropriate for the Commission to now clarify its interpretation of Section 253 with the goal of removing barriers to deployment.

B. The Commission Has Drawn on Its Extensive Expertise to Refine Its Preemption Analysis Under Section 253

In the more than twenty years since the passage of the 1996 Act, the Commission has had a number of opportunities to pass on the scope of the relevant provisions. In *New England Public Communications Council Petition for Preemption*, the FCC established that a regulation imposing strict eligibility criteria to offer telecommunications services constitutes a facial prohibition on the provision of services in violation of Section 253(a).[46] The Commission also

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Tex. v. FCC, 569 U.S. 290, 307 (2013) ("Congress has unambiguously vested the FCC with general authority to administer the Communications Act through rulemaking and adjudication.").

[41] *United States v. Haggar Apparel Co.*, 526 U.S. 380, 392 (1999).

[42] *Smiley v. Citibank (S. Dakota)*, 517 U.S. 735, 741 (1996).

[43] *City of Arlington, Tex.*, 569 U.S. at 296.

[44] *Nat'l Cable & Telecommunications Ass'n, Inc. v. Gulf Power Co.*, 534 U.S. 327, 328 (2002).

[45] *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (U.S. 2000).

[46] *New England Public Communications Council Petition for Preemption*, Memorandum Opinion and Order, 11 FCC Rcd. 19713, ¶ 18 (1996) ("On its face, the *DPUC Decision* [limiting the provision of payphone services to incumbent and certified local exchange carriers]

discussed the contours of Section 253(b), explaining that a regulation that singles out and provides preferential treatment to one group of providers over another is *per se* discriminatory and cannot be neutral.[47] Furthermore, the Commission explained that because the proposed regulation must be "necessary" to "safeguard the rights of consumers" or to "protect the public safety or welfare" to fall under Section 253(b), a regulation that is merely reasonable is not exempt from preemption.[48]

The Commission further defined the "prohibits or has the effect of prohibiting" standard in *California Payphone*.[49] There, the Commission found that in addition to regulations that plainly prohibit the provision of telecommunications services, a regulation can have "the effect of prohibiting" the provision of services in violation of the statute if such regulation "materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment."[50] Despite this articulation of the prohibition standard—which continues to be cited by courts and the FCC alike as the seminal test for determining unlawful prohibition—the Commission ultimately declined to preempt the local ordinance at issue in *California Payphone* by applying an additional and more stringent test. Specifically, the Commission, relying on the undeveloped factual record before it, found that the petitioning provider failed to demonstrate that it "lack[ed] a commercially viable opportunity" to provide the subject telecommunications services (in this case payphone services) in light of the city's ordinance (which prohibited the installation of outdoor payphones on private property).[51] Neither the FCC nor the courts have applied this commercial viability test in subsequent decisions, and the commercial viability test does not square with the plain language of Section 253(a).

In *Texas PUC*, the Commission continued its interpretive development of unlawful prohibition, clarifying that a state or locality cannot specify the "the means or facilities" through which a service provider must offer its services.[52] The FCC also recognized that imposing "financial

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'prohibit[s]' a certain class of telecommunications service providers, *i.e.*, independent payphone providers, from 'provid[ing] [an] interstate or intrastate telecommunications service.'").

[47] *Id.* ¶ 20 ("[T]he DPUC's prohibition is not neutral on its face -- it singles out independent (i.e., non-LEC) payphone providers and bars them from the payphone market unless they become certified LECs. The prohibition allows incumbent LECs and certified LECs to offer payphone services, but bars another class of providers (independent payphone providers).").

[48] *Id.* ¶ 21.

[49] *California Payphone Association Petition for Preemption of Ordinance No. 576 NS of the City of Huntington Park, California Pursuant to Section 253(d) of the Communications Act of 1934*, Memorandum Opinion and Order, 12 FCC Rcd. 14191 (1997) ("*California Payphone*").

[50] *Id.* ¶ 31.

[51] *Id.* ¶ 41.

[52] *Texas PUC* ¶ 74.

burdens" upon the offering of services can "have the effect of prohibiting" the provision of service in violation of Section 253.[53]

In *State of Minnesota*, the Commission delved into the meaning of the Section 253(c) savings clause.[54] Specifically, it held that an exclusive agreement cannot be saved either because it was entered into through an open bidding process or because it included alternative, but less desirable, means of entry.[55] The Commission also addressed the issue of what constitutes ROW management under section 253(c), finding that Congress intended to limit ROW management to the issuance of "construction permits regulating how and when construction is conducted on roads and other public rights-of-way."[56] Accordingly, the Commission expressed "serious reservations" as to whether a scheme that "grant[s] exclusive physical access to [the] right-of-way to a single entity in return for valuable consideration" could even be considered ROW management.[57]

Most recently, in *Sandwich Isles*, the Commission further clarified the scope of reasonable ROW management under Section 253(c). First, the Commission explained that the fact a state or locality is "bargaining with the land that it owns" is irrelevant to the Section 253 analysis.[58] Recalling its assertion in *State of Minnesota* that "the types of activities that fall within the sphere of appropriate rights-of-way management" include "coordination of construction schedules, determination of insurance, bonding and indemnity requirements, establishment and enforcement of building codes, and keeping track of various systems using the rights-of-way to prevent interference between them,"[59] the Commission determined that upholding an exclusive grant to one provider to operate a telecommunications network on public lands under Section 253(c) "would allow the [ROW] management exception to swallow whole the broad congressional preemption under Section 253(a) and render that statutory provision meaningless."[60]

C. Courts Have Adopted Differing Views of Section 253, Requiring Clarification By The Commission

Despite the Commission's efforts to define the boundaries of federal preemption under Section 253, courts have issued a number of conflicting decisions that have only served to confuse the

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[53] *Id.* ¶¶ 13, 78-79.

[54] *Petition of the State of Minnesota for a Declaratory Ruling Regarding the Effect of Section 253 on an Agreement to Install Fiber Optic Wholesale Transport Capacity in State Freeway Rights-Of-Way*, Memorandum Opinion and Order, 14 FCC Rcd. 21697 (1999) ("*State of Minnesota*").

[55] *Id*. ¶ 59.

[56] *Id.* ¶ 60 (deemphasized).

[57] *Id*.

[58] *Sandwich Isles* ¶ 14 (quotation marks omitted).

[59] *Id.* ¶ 23 (citing *State of Minnesota* ¶ 60 n.129)

[60] *Id*. (quotation marks and citation omitted).

preemption analysis under section 253. In *City of Auburn v. Qwest*, the Ninth Circuit adopted a broad interpretation of the "effect of prohibiting" clause, declaring that actions that "may . . . have the effect of prohibiting" the provision of telecommunications services violate Section 253. Some courts followed the *City of Auburn* court's reading of the statute,[61] while others criticized the court for misinterpreting the structure of Section 253.[62] In *Level 3 Communications v. City of St. Louis*, the Eighth Circuit held that it was not enough that a requirement "may" have the effect of prohibiting service; rather, there has to be a showing of "actual or effective prohibition, rather than the mere possibility of prohibition."[63] The Ninth Circuit subsequently adopted the Eighth Circuit's interpretation, overruling *City of Auburn*.[64] Both the Eighth and Ninth Circuit cited the FCC's *California Payphone* decision, but in emphasizing that litigants must show an existing actual or effective preemptive effect, both courts appear to have read the standard in an overly narrow fashion.

In attempting to correct the grammatical error in this earlier interpretation of Section 253, the Eighth and Ninth Circuits overcompensated in suggesting that the statute requires evidence of an *existing* prohibition.[65] Rather, as the First and Second Circuits have recognized, an effective prohibition can be established by an evidentiary record demonstrating that the law or regulation will "materially inhibit" the provision of services, whether or not the services have already been prohibited.[66] This material inhibition standard adopted by the courts originates in the FCC's *California Payphone* decision, which found that the FCC should consider "whether the ordinance materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment."[67] The Commission should clarify that the *California Payphone* standard as interpreted by the First and Second Circuits is the appropriate standard going forward.

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[61] *See, e.g., Puerto Rico Telephone Co. v. Municipality of Guayanilla,* 450 F.3d 9, 18 (1st Cir.2006); *Qwest Corp. v. City of Santa Fe*, 380 F.3d 1258, 1270 (10th Cir.2004)*; TCG N.Y., Inc. v. City of White Plains*, 305 F.3d 67, 76 (2d Cir. 2002); *NextG Networks of Cal., Inc. v. County of Los Angeles*, 522 F.Supp.2d 1240, 1253 (C.D. Cal. 2007); *TC Sys., Inc. v. Town of Colonie*, 263 F.Supp.2d 471, 481–84 (N.D.N.Y. 2003); *XO Mo., Inc. v. City of Maryland Heights*, 256 F.Supp.2d 987, 996–98 (E.D. Mo. 2003).

[62] *See City of Portland v. Elec. Lightwave, Inc.*, 452 F.Supp.2d 1049, 1059 (D. Or. 2005); *Qwest Corp. v. City of Portland*, 200 F.Supp.2d 1250, 1255 (D. Or. 2002), *rev'd in part*, 385 F.3d 1236 (9th Cir. 2004); *Newpath Networks LLC v. City of Irvine*, No. SACV–06–550, 2008 WL 2199689, at *4 (C.D. Cal. Mar. 10, 2008).

[63] 540 F.3d 794, 795 (8th Cir. 2008).

[64] *Sprint Telephony PCS, L.P. v. Cty. of San Diego*, 543 F.3d 571, 578 (9th Cir. 2008).

[65] *See Sprint Telephony PCS, L.P.*, 543 F.3d at 577; *Level 3 Commc'ns, L.L.C. v. City of St. Louis, Mo.*, 477 F.3d 528, 533 (8th Cir. 2007).

[66] *See TCG New York, Inc. v. City of White Plains*, 305 F.3d 67, 76 (2d Cir. 2002); *Puerto Rico Telephone Co.*, 450 F.3d at 18.

[67] *California Payphone* ¶ 31.

Any interpretation of the material inhibition standard must account for laws and regulations that have the effect of prohibiting expansions of existing services, focusing not only on coverage but also on capacity. Densification of networks will be key for augmenting the capacity of existing networks and laying the groundwork for the deployment of 5G. The Commission should recognize that a prohibition occurs not only when it impacts the ability to provide service in the first instance, but also when it affects the ability to expand existing services to provide adequate speeds and capacity.

The agency should also provide additional guidance on what it means to compete in a "fair and balanced regulatory environment." This section of the *California Payphone* standard recognizes that the prohibition inquiry cannot be conducted in isolation. A regulatory structure that gives an advantage to particular services or facilities has a prohibitory effect, even if there are no express barriers to entry in the state or local code; the greater the discriminatory effect, the more certain it is that entities providing service using the disfavored facilities will experience prohibition. The record shows that presently, local jurisdictions apply radically different regulatory regimes to wireline and wireless telecommunications services, particularly in the ROW. In many cases, local jurisdictions allow wireline providers and other utilities to install facilities (including new poles) in the ROW without discretionary siting review, while applying zoning requirements to small cell wireless deployments that have similar or even smaller impact.[68] This discrimination is often justified or driven by a fundamental misunderstanding on the part of local jurisdictions regarding the reach and scope of Sections 253 and 332, or by a belief that wireline and wireless services do not compete with one another and should be subject to different federal rules. There is no support for this view in either the text of the statute or in the marketplace. Wireless and wireline services are increasingly substitutes for one another in the broadband and telecommunications space, and just as importantly, the facilities used for small cell services involve large amounts of fiber optic deployments that are materially identical to the kinds of facilities deployed by wireline providers. The Commission should thus clearly articulate that under *California Payphone,* where telecommunications facilities impose an equivalent burden they should be subject to the same requirements, regardless of the type of facilities used.

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[68] *See, e.g.,* Comments of T-Mobile, WT Docket No. 17-79, WC Docket No. 17-84 at 10 (filed June 15, 2017) (majority of jurisdictions treat DAS and small cell deployments differently than they treat similar installations by landline, cable, or electric utilities) ("T-Mobile Comments"); Comments of ExteNet Systems, Inc., WT Docket No. 17-79, WC Docket No. 17-84 at 17 (filed June 15, 2017) (nearly half of jurisdictions where ExteNet seeks to deploy have subjected it to processes and standards that differed from those required of wireline providers and utilities in public ROWs, even though ExteNet's attachments are similar-sized); Crown Castle Comments at 14 (describing San Fransisco pre-deployment review for wireless facilities that does not apply to wireline); T-Mobile Comments at 39-40 (same); Comments of Wireless Infrastructure Association, WT Docket No. 17-79, WC Docket No. 17-84 at 12-13 (filed June 15, 2017) (providing examples of local governments discriminating against wireless carriers seeking to deploy small wireless facilities in ROWs by applying different permitting requirements than those imposed on other telecommunications carriers and utilities seeking to deploy similarly sized equipment).

The record also supports a rebuttable presumption that laws and regulations that limit the placement of wireless facilities, impose onerous regulations on infrastructure providers, impose excessive fees on infrastructure deployments, or materially delay infrastructure deployments will effectively prohibit the provision of wireless services. Commenters cited numerous examples of how unnecessary and unreasonable state and local actions added cost and time burdens to infrastructure deployments, in some cases leading to abandonment of projects.[69] These types of obstacles threaten the promise of small cell wireless services, and should be addressed by the Commission in this proceeding.

This approach does not prohibit the imposition or increase in the costs or fees charged by states and localities, but it will subject them to a materiality and discrimination standard. As the First Circuit found in *Puerto Rico Telephone*, the imposition of fees that would substantially increase the cost of doing business could materially inhibit or limit the ability of a provider to compete in a fair and balanced legal and regulatory environment.[70]

Finally, although Section 253 applies specifically to prohibitions on providing "telecommunications service," the Commission's standard should make clear that Section 253 applies to all restrictions that affect facilities used to provide telecommunications service, regardless of whether those facilities are also used to provide other types of service at any given time. Failure to account for commingled facilities would invite municipalities to inquire into and regulate the services offered—an inquiry which they are ill-qualified to pursue and which could only delay infrastructure deployment. Providers should be the ones deciding how best to provide service, and any barrier to doing so constitutes a "prohibition" in violation of Section 253. States and localities should not be allowed to bar the use of particular frequencies or technologies just because there are (or could be) alternative means of providing service. In fact, because the FCC has been charged with managing spectrum efficiently and breaking down barriers to broadband deployment,[71] state and local interference with the ability to build out broadband networks and use wireless spectrum pose a fundamental conflict to the FCC's goals, separate and apart from Section 253.

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[69] *See, e.g.* Crown Castle Comments at 8-22 (detailing how onerous municipal zoning and planning restrictions and arbitrary fees have hindered deployment of next-generation wireless services); AT&T Comments at 12-24 (describing how unreasonable restrictions, fees, and permitting processes violate Section 253); T-Mobile Comments at 26-33 (describing unreasonable fees assessed for access and use of ROWs and applications to site wireless facilities generally); Comments of Sprint, WT Docket No. 17-79 at 37-45 (filed June 15, 2017) (addressing the barriers to infrastructure deployment caused by state and local governments including limiting access to ROW, total exclusions, moratoria, discrimination, siting requirements that question network design, and excessive delays).

[70] *Puerto Rico Telephone Co.*, 450 F.3d at 19.

[71] *See* 47 U.S.C. §§ 151, 1302.

D. As With Section 253, The Commission Should Apply A Material Inhibition Standard For Wireless Siting Decisions Subject To Section 332(C)(7)

As discussed, the Commission should clarify, consistent with precedent, that an "effective prohibition" under Section 253(a) can be established by a demonstration that the state or local action will "materially inhibit" the provision of services. As with Section 253(a), Section 332(c)(7) gives state and local governments authority over the placement, construction, and modification of personal wireless facilities provided the regulation does "not prohibit or have the effect of prohibiting the provision of personal wireless services."[72] Given the nearly identical language regarding prohibition in Sections 253 and 332, the Commission should make clear that the "material inhibition" standard used to prove prohibition in Section 253 can also be used to show prohibition under Section 332.

The Commission should thus reject the "significant gap" standard that some courts have articulated in some Section 332 cases as the sole means of demonstrating prohibition under Section 332.[73] This standard requires the applicant to show that there is a significant gap in coverage, and that its proposed facility is the "least intrusive means" to fill that gap.[74] This standard is too narrow and permits many prohibitory practices to persist. Moreover, it is simply incompatible with a world where the vast majority of new wireless builds are going to be designed to add network capacity and take advantage of new technologies, rather than plug gaps in network coverage.

In this context, the "least intrusive means" test no longer provides sufficient analytic breadth. Sites are not picked in isolation, but as part of a network that can deliver a consistent, high-speed experience to consumers. When trying to maximize spectrum re-use and boost capacity, moving facilities by just a few hundred feet can mean the difference between excellent service and poor service. The FCC's rules, therefore, must account for the effect siting decisions would have on every level of service, including increasing capacity and adding new spectrum bands. Practices

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[72] 47 U.S.C. § 332(c)(7).

[73] *Sprint Spectrum, LP v. Willoth*, 176 F.3d 630, 643 (2d Cir. 1999) ("[L]ocal governments must allow service providers to fill gaps in the ability of wireless telephones to have access to landlines."); *APT Pittsburgh Ltd. P'ship v. Penn Township*, 196 F.3d 469, 480 (3d Cir. 1999) ("In order to show a violation of [Section 332] an unsuccessful provider applicant must show . . . that its facility will fill an existing significant gap in the ability of remote users to access the national telephone network . . . [and] that the manner in which it proposes to fill the significant gap in service is the least intrusive on the values that the denial sought to serve."); *Am. Tower Corp. v. City of San Diego*, 763 F.3d 1035, 1056-57 (9th Cir. 2014) ("A locality violates this provision "if it prevent[s] a wireless provider from closing a 'significant gap' in service coverage.").

[74] *Willoth*, 176 F.3d at 643 ("We hold only that the Act's ban on prohibiting personal wireless services precludes denying an application for a facility that is the least intrusive means for closing a significant gap in a remote user's ability to reach a cell site that provides access to land-lines.").

and decisions that prevent carriers from doing either materially prohibit the provision of telecommunications service and thus should be considered impermissible under Section 332.

E. The Commission Should Reiterate That "Legal Requirements" Is an Expansive Term

Section 253(a) applies to a "state or local statute or regulation, or other state or local legal requirement" that has the effect of prohibiting the ability of any entity to provide any telecommunications service.[75] The Commission should clarify that "legal requirement" is a broad term encompassing any type of state or local action, including judicial decisions. This will allow the Commission to preempt all varieties of state or local action that serve to impede broadband deployment, regardless of what form that action takes, in furtherance of the goals of the Communications Act.

The Commission has already embraced an expansive understanding of "legal requirement." In *State of Minnesota*, the Commission rejected the argument that an agreement providing exclusive access to the right of way for a ten-year period did not create a "legal requirement" subject to section 253.[76] As the Commission explained, "[a]warding Developer exclusive physical access to these rights-of-way as part of a contract legally binds the State to deny other entities permits for access to these freeway rights-of-way. Therefore, the Agreement between the Developer and the State creates a 'legal requirement' that prevents the State from granting potential competitors access to these freeway rights-of-way."[77] The Commission noted that "the fact that Congress included the term 'other legal requirements' within the scope of section 253(a) recognizes that State and local barriers to entry could come from sources other than statutes and regulations."[78]

The Commission also found that an exclusive license could be a "legal requirement" under Section 253(a) in the *Sandwich Isles* case.[79] There, the exclusive license legally bound the state of Hawaii to deny other competitors the right to operate a telecommunications network, consequently adversely affecting those competitors.[80] The Commission found that "interpreting the term 'legal requirement' broadly best fulfills Congress' desire to ensure that [s]tates and localities do not impede the development of competition."[81] Indeed, it follows that any effort by a state court to impose a judicial restriction that would have the effect of prohibiting

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[75] 47 U.S.C. § 253(a).

[76] *State of Minnesota* ¶ 3.

[77] *Id.* ¶ 17.

[78] *Id.* ¶ 18.

[79] *Sandwich Isles* ¶ 13.

[80] *Id.*

[81] *Id.*

telecommunications service also would be a subject to prohibition under section 253. Just as an exclusive contract legally binds the state, so too does a judicial decision.[82]

F. The Commission Should Determine That Management of Rights-Of-Way Is Not A "Proprietary" Act

Finally, some states and localities have claimed that granting access to municipal ROW is a proprietary function not subject to Section 253(a), and thus they can deny access at will, or condition access on onerous terms and conditions. Under this reasoning, municipalities could bar wireless facility deployments in ROWs with impunity, which runs contrary to the explicit language and purpose of Section 253.[83]

Of course, the Commission can and should distinguish between action taken by a municipality in its proprietary capacity and that taken in its regulatory capacity. Some state and local property management activities may properly be considered proprietary, such as leasing space on the roof of a school.[84] However, Section 253(c) "preserves the traditional authority of state and local governments to *manage* the public rights-of-way."[85] Management of the ROW includes the "vital tasks necessary to preserve the physical integrity of streets and highways, to control the orderly flow of vehicles and pedestrians, to manage gas, water, cable (both electric and cable television), and telephone facilities that crisscross the streets and public rights-of-way,"[86] but the police power that localities have to carry out these functions is not the same thing as holding title in fee simple or its equivalent.

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[82] Further evidence of how judicial enforcement of an agreement can be considered a state action is found in the Fourteenth Amendment context. Courts have recognized that "'[i]t is doubtless true that a State may act through different agencies,—either by its legislative, its executive, or its judicial authorities; and the prohibitions of the amendment extend to all action of the State denying equal protection of the laws, whether it be action by one of these agencies or by another." *Commonwealth of Virginia v. Rives*, 100 U.S. 313, 318 (1879). Indeed, "it has never been suggested that state court action is immunized from the operation of those [Fourteenth Amendment] provisions simply because the act is that of the judicial branch of the state government." *Shelley v. Kraemer*, 334 U.S. 1, 18 (1948).

[83] *See, e.g.*, 47 U.S.C. § 253(a) ("No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service."). Section 253(c), which carves out ROW management, would hardly be necessary if all ROW decisions were proprietary and shielded from the statute's sweep.

[84] *See generally Sprint Spectrum L.P. v. Mills*, 283 F.3d 404, 417-21 (2d Cir. 2002) (discussing distinction between proprietary and regulatory actions).

[85] *BellSouth Telecommunications, Inc. v. City of Mobile*, 171 F. Supp. 2d 1261, 1274 (S.D. Ala. 2001) (emphasis added).

[86] *TCI Cablevision of Oakland Cty., Inc.*, Memorandum Opinion & Order, 12 FCC Rcd. 21396, ¶ 103 (1997).

Although courts and the Commission have been careful to carve out actions by states or municipalities in their proprietary capacities,[87] the agency should explicitly clarify that this proprietary exception does not apply to the rights-of-way. That is consistent with FCC precedent, where the Commission has reviewed the legislative history of Section 253(c) and found that it was intended to "make[] explicit a local government's continuing authority to issue construction permits regulating how and when construction is conducted on roads and other public rights-of-way."[88] Indeed, "[t]he Commission . . . described the 'types of activities that fall within the sphere of appropriate rights-of-way management' as including 'coordination of construction schedules, determination of insurance, bonding and indemnity requirements, establishment and enforcement of building codes, and keeping track of various systems using the rights-of-way to prevent interference between them.'"[89]

In sum, to manage is not to own, and Section 253(c) recognizes that, with respect to the right-of-way, states and localities act as managers, not owners. The ROW are public goods held in public trust and do not constitute "property" owned by a local jurisdiction that can be used in whatever way the jurisdiction sees fit. Indeed, courts across the country have recognized that "the ownership interest municipalities hold in their streets is governmental, and not proprietary."[90]

And even as to true proprietary activities, such as leasing space on public buildings, section 253(a) still requires the municipality to act in a manner that does not materially inhibit or limit the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment.[91] Where municipalities fail to comply with these provisions, the state and local legal requirements are preempted by the plain terms of the statute.

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[87] *See generally Mills*, 283 F.3d at 417-21 (discussing distinction between proprietary and regulatory actions); *2014 Infrastructure Order* ¶¶ 237-40.

[88] *State of Minnesota* at ¶ 60.

[89] *Sandwich Isles* ¶ 23.

[90] *Cf. Liberty Cablevision Of Puerto Rico, Inc. v. Municipality Of Caguas*, 417 F.3d 216, 222 (1st Cir. 2005) ("Even when the fee of the streets is in the city, in trust for the public, it is a mistake to suppose that the city is constitutionally and necessarily entitled to compensation").

[91] 47 U.S.C. § 253(c).

III. CONCLUSION

Crown Castle appreciates the work the Commission has done to date to streamline the deployment of infrastructure to support wireless broadband networks. For the reasons stated above, Crown Castle encourages the Commission to use its authority under Sections 253 and 332 to act swiftly to remove remaining state and local barriers to infrastructure deployment.

Respectfully submitted,

CROWN CASTLE
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Attachment 1

LM

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Crown Castle NG East LLC and Pennsylvania-CLE LLC, Petitioners	:	
v.	:	No. 697 C.D. 2017
	:	Argued: February 7, 2018
Pennsylvania Public Utility Commission, Respondent	:	

BEFORE: **HONORABLE MARY HANNAH LEAVITT,** President Judge
HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge
HONORABLE ANNE E. COVEY, Judge
HONORABLE MICHAEL H. WOJCIK, Judge
HONORABLE CHRISTINE FIZZANO CANNON, Judge
HONORABLE ELLEN CEISLER, Judge

OPINION BY
JUDGE COHN JUBELIRER **FILED: June 7, 2018**

The Petitioners in this case operate neutral-host Distributed Antenna System (DAS) networks, which are used by various wireless companies to transport wireless data and voice traffic. For 10 years, the Pennsylvania Public Utility Commission (Commission) certificated DAS networks as public utilities. On March 17, 2017, the PUC issued an Order (DAS Order) in which it reversed its longstanding practice, finding that DAS network operators are not public utilities

under the Pennsylvania Public Utility Code (Code)[1] and, therefore, are not within the Commission's jurisdiction. After the Commission denied reconsideration of the DAS Order, Petitioners Crown Castle NG East LLC and Pennsylvania-CLE LLC (together, Crown Castle), petitioned for review of the Commission's Orders. While the facts may be quite technical, the legal principles involved are straightforward. After reviewing the relevant language in the Code, this Court's precedent, the decisions related to the certification of DAS networks by public utility commissions in other jurisdictions, and relevant federal law, we conclude the Commission erred in its interpretation of the Code to exclude DAS network operators from the definition of public utility, and, accordingly, we reverse.

I. Background

A. DAS Networks

Generally, neutral-host DAS networks provide transport services to their Wireless Service Provider (WSP) customers, such as AT&T Wireless or Verizon Wireless, via the networks' fiber optic lines, which run between remote, fixed-point "nodes" and a centrally-located "hub."[2] The DAS network works in conjunction with the facilities and equipment owned by the WSPs and the WSPs' retail customer, the cell phone or smart phone user, to provide transport to wireless communication. DAS networks essentially provide increased coverage and/or capacity within a localized area by collecting wireless traffic from a WSP's retail end-user, transmitting it over the DAS network (typically using terrestrial fiber

[1] 66 Pa. C.S. §§ 101-3316.

[2] WSPs can operate their own DAS networks that serve only their retail end-user customers.

optic lines) and delivering it back to the WSP's network. An advantage of a DAS network is that it "us[es] components that are a fraction of the size of macrocell deployments, [that] can be installed – with little or no impact – on utility poles, buildings, and other existing structures." *In Re: Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies*, 29 FCC Rcd. 12865, 12867 (F.C.C. 2014) (*2014 Wireless Infrastructure Order*). "DAS deployments offer robust and broad coverage without creating the visual and physical impacts of multiple macrocells." *Id.* at 12879. They can be deployed in "densely populated urban areas, where traditional towers are not feasible or in areas, such as stadiums, where localized wireless traffic demands would require an unrealistic number of macrocells." *Id.* at 12880. DAS networks may be owned and operated by a WSP for the sole use of its customers, or owned and operated by a neutral-host, such as Crown Castle NG East LLC, which may lease its network to multiple WSPs.

B. The Commission's Treatment of DAS Networks from 2005 to 2015

Between 2005 and 2015, the Commission granted certificates of public convenience (Certificate) to DAS network operators as competitive access providers (CAPs)[3] on the basis that they were public utilities under subsection (1)(vi) of the definition of public utility under the Code:

> (1) Any person or corporations now or hereafter owning or operating in this Commonwealth equipment or facilities for:
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> ***

[3] "CAP service . . . [i]s a dedicated point-to-point or multipoint service; voice or data." *In Re: Review of Issues Relating to Comm'n Certification of Distributed Antennae Sys. Providers in Pa.*, No. M-2016-2517831 at 3 n.5 (Pa. P.U.C. 2016) (internal quotation marks omitted).

(vi) Conveying or transmitting messages or communications, except as set forth in paragraph (2)(iv), by telephone or telegraph or domestic public land mobile radio service including, but not limited to, point-to-point microwave radio service for the public for compensation.

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(2) The term does not include:

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(iv) Any person or corporation, not otherwise a public utility, who or which furnishes mobile domestic cellular radio telecommunications service.

Section 102 of the Code, 66 Pa. C.S. § 102. At least five DAS network operators, including Crown Castle,[4] were granted Certificates by the Commission during that time period.

In 2015, during the Commission's consideration of an application for a Certificate filed by the DAS network operator SQF, LLC, (SQF), two members of the Commission began questioning the Commission's historical treatment of DAS network operators as public utilities under subsection (1)(vi) of the Code. *See Appl. of SQF, LLC for Approval to Offer, Render, Furnish or Supply Telecomm. Servs. as a Competitive Access Provider to the Pub. in the Commonwealth of Pa.*, No. A-2015-2490501 (Pa. P.U.C. 2015), Statements of then-Vice Chairman John

[4] Crown Castle NG East LLC originally received a Certificate under the name NextG Networks of NY, Inc., but subsequently changed its name. (Crown Castle's Comments at 1 n.1, Reproduced Record (R.R.) at 52a.) Pennsylvania-CLE LLC also received a Certificate and, as a result of a merger, both Crown Castle NG East LLC and Pennsylvania-CLE LLC are "wholly-owned subsidiaries of a common parent." (*Id.*) Throughout the country, Crown Castle owns and operates "shared telecommunications infrastructure" in the amount of 15,000 DAS and small cell installations, and more than 16,000 miles of fiber optic lines, and provides telecommunications services via DAS networks. (*Id.* at 53a.) Crown Castle currently holds Certificates or the equivalent in 46 states and in Puerto Rico and the District of Columbia, and it provides DAS networks in more than 35 communities throughout Pennsylvania. (*Id.*)

F. Coleman, Jr., and former-Commissioner Robert F. Powelson.[5] If DAS networks' operators were not public utilities under subsection (1)(vi), they stated, then the Commission did not have jurisdiction to regulate or issue Certificates to those operators. *See id.*; Section 501 of the Code, 66 Pa. C.S. § 501 (setting forth the Commission's general powers to, *inter alia,* supervise and regulate all public utilities in the Commonwealth). The Commission granted a Certificate to SQF, but directed the opening of formal proceedings to investigate the question of whether DAS network operators were public utilities over which the Commission had jurisdiction.

C. The Commission's 2016 Investigatory Proceedings

In February 2016, the Commission opened a formal investigatory proceeding on the jurisdictional question. In particular, this question was whether DAS network operators were public utilities under subsection (1)(vi) as an entity that conveyed or transmitted messages or communications, as they had been historically treated, or fell within the exclusion from that definition set forth in subsection (2)(iv) for "[a]ny person or corporation, not otherwise a public utility, who or which furnishes mobile domestic cellular radio telecommunications service." 66 Pa. C.S. § 102. The term "mobile domestic cellular radio telecommunications service" is not defined in the Code, but has been considered synonymous with the term "commercial mobile radio service" (CMRS),

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[5] These statements are available at http://www.puc.state.pa.us/pcdocs/1392246.pdf and http://www.puc.state.pa.us/pcdocs/1392235.pdf (last visited June 6, 2018). Vice Chairman Coleman served in that position until December 31, 2015, and remains on the Commission. Commissioner Powelson is no longer a Commission member having been appointed to the Federal Energy Regulatory Commission.

(Reproduced Record (R.R.) at 18a n.4), which is defined by Section 20.3 of the federal telecommunications regulations (Federal Regulations), 47 C.F.R. § 20.3.[6] Traditionally, it is the WSPs that provide CMRS to **their** retail cell phone customers, because CMRS is an interconnected, mobile wireless communication service that is provided to the public for profit. Vice Chairman Coleman and Commissioner Powelson suggested that DAS network operators were, in actuality, furnishing CMRS because the services and infrastructure the DAS network operators offered to their WSP customers could not be separated from the federally-regulated CMRS the WSPs offered to their own retail end-users. Under this interpretation, they contended, the services provided by DAS network operators were outside the Commission's jurisdiction.

The investigation did not include a hearing, and, instead, the Commission requested comments and reply comments from stakeholders regarding whether: "DAS [operators] are public utilities under Pennsylvania law that can be certificated"; "the Commission should or is required to certificate these carriers in

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[6] CMRS is defined as "[a] mobile service that is: (a)(1) provided for profit, i.e., with the intent of receiving compensation or monetary gain; (2) [a]n interconnected service; and (3) [a]vailable to the public, or to such classes of eligible users as to be effectively available to a substantial portion of the public." 47 C.F.R. § 20.3. In pertinent part, an "interconnected service" is "[a] service: (a) [t]hat is interconnected with the public switched network, or interconnected with the public switched network through an interconnected service provider, that gives subscribers the capability to communicate to or receive communication from other users on the public switched network[.]" *Id.* "Mobile service" is "[a] radio communication service carried on between mobile stations or receivers and land stations, and by mobile stations communicating among themselves . . . ." *Id.* "Radio communication" "means the transmission by radio of writing, signs, signals, pictures, and sounds of all kinds, including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission." Section 153(40) of the Federal Telecommunications Act of 1996 (Federal Act), 47 U.S.C. § 153(40). A "'mobile station' means a radio-communication station capable of being moved and which ordinarily does move." Section 153(34) of the Federal Act, 47 U.S.C. § 153(34).

furtherance of federal law"; "DAS service is an interstate service, intrastate service, or both"; and "a C[ertificate] is needed to confer property rights to DAS [operators] to site the facilities/equipment used to provide DAS service, including access to rights-of-way and eminent domain."[7] (R.R. at 19a.) Further, the stakeholders were to address in their responses whether DAS network operators furnish CMRS, thereby precluding them from being a public utility under subsection (2)(iv).

Numerous stakeholders responded. Crown Castle and ExteNet Systems, Inc.[8] (ExteNet) and organizations representing DAS network providers and owners of telecommunications facilities, including CTIA – The Wireless Association (CTIA) and PCIA – The Wireless Infrastructure Association (together, Industry Stakeholders), responded with comments. Also responding were the Pennsylvania Municipal League, the Pennsylvania State Association of Township Supervisors, the Pennsylvania State Association of Boroughs, and the Pennsylvania State Association of Township Commissioners (together, Municipal Stakeholders). Finally, the Office of Consumer Advocate (Consumer Advocate) offered comments.

Industry Stakeholders indicated that DAS network operators should retain their status as public utilities under subsection (1)(vi) as intrastate telecommunications service providers, as they historically have been treated by the Commission and numerous other jurisdictions. Industry Stakeholders maintained that DAS network operators were not furnishing CMRS because they do not offer

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[7] The Commission set forth additional questions for stakeholders to answer in an appendix to the February 2016 Order.

[8] ExteNet Systems, Inc. (ExteNet) is a DAS network operator that holds a Certificate in Pennsylvania and is also certificated in 35 states. (ExteNet's Comments at 3, R.R. at 106a.)

mobile or wireless services regulated by the Federal Communications Commission (FCC). Rather, DAS network operators offer wholesale point-to-point transport services to WSPs, similar to those that were considered certificated telecommunications services in *Rural Telephone Company Coalition v. Pennsylvania Public Utility Commission*, 941 A.2d 751 (Pa. Cmwlth. 2008). Although pursuant to Section 224 of the Federal Telecommunications Act of 1996 (Federal Act), 47 U.S.C. § 224 (addressing pole attachments for wireless facilities), and FCC rulings, DAS network operators should be permitted access to municipal and public utility rights-of-way to install DAS network facilities, Industry Stakeholders stated they often needed to show a Certificate before being granted that access. Even potential clients, they indicated, have requested proof of a DAS network operator's Certificate before entering into an agreement with the operator. Industry Stakeholders also commented that not providing DAS network operators with Certificates, or stripping them of their existing Certificates, could violate Section 253 of the Federal Act, 47 U.S.C. § 253,[9] by impeding the operators' ability to compete in a fair and balanced regulatory environment.

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[9] Section 253(a) of the Federal Act provides, in pertinent part, "No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." 47 U.S.C. § 253(a). Section 253(b) states:

> Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254 of this title, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.

47 U.S.C. § 253(b). Section 253(c) allows a "State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-

(Footnote continued on next page...)

Municipal Stakeholders took the position that DAS network operators were expressly excluded from the definition of public utilities because they provide interstate CMRS. According to Municipal Stakeholders, DAS network operators provide CMRS because they facilitate traditional CMRS services. They contended that continuing to grant Certificates to DAS network operators is inconsistent with Commission precedent and with *Rural Telephone* because those operators do not connect to the Public Switched Telephone Network (PSTN) and are primarily interstate telecommunications CMRS falling within the FCC's regulatory purview. Municipal Stakeholders stated that federal law and Pennsylvania's Wireless Broadband Collocation Act[10] amply protects DAS network operators' ability to site DAS facilities within public rights-of-way or on existing public utility facilities, and they were unaware of any municipality or public utility requiring DAS network operators to obtain a Certificate before allowing the placement of DAS facilities. They further claimed that federal law does not require the Commission to issue Certificates to DAS network operators, and the denial or rescission of Certificates to those operators will not violate Section 253 of the Federal Act or any other federal law. Granting Certificates, which confer an exemption from local zoning and the power of eminent domain, to DAS network operators, Municipal Stakeholders stated, would have a detrimental effect on local and state governments.

Consumer Advocate commented that DAS network operators were better classified as providing interstate wholesale CMRS service than as a public utility.

(continued...)

way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government." 47 U.S.C. § 253(c).

[10] Act of October 24, 2012, P.L. 1501, 53 P.S. §§ 11702.1-11702.6.

Consumer Advocate posited that the Commission was not required by federal law to issue Certificates to DAS network operators, and that DAS network operators already have access to pole attachments under federal law. However, Consumer Advocate was in favor of each certificated CAP being reviewed to determine whether it otherwise qualified as a public utility.

Industry Stakeholders submitted responses to the comments of Municipal Stakeholders and Consumer Advocate reiterating their earlier arguments, adding that DAS network operators do not meet the federal definition of CMRS and pointing out that those operators do not provide wholesale or other CMRS services but **intrastate transmission or transport path** services to wireless carriers. PCIA observed that finding an entity that **facilitates** traditional CMRS services to be a CMRS **provider** would re-define numerous providers of non-DAS types of telecommunication services, such as traditional backhaul service[11] providers, as CMRS providers, an outcome that should be avoided.

II. The Commission's 2017 DAS Order

After considering the comments and reply comments, the Commission entered the DAS Order on March 17, 2017,[12] reversing its historic treatment of DAS network operators based on the Commission's finding that they were not public utilities because their "facilities furnish mobile domestic cellular radio telecommunications service" and, therefore, were not subject to the Commission's jurisdiction or entitled to a Certificate. (DAS Order at 1, 33, 35.) The Commission

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[11] Backhaul service is the transport of traffic between a wireless carrier's tower-mounted antennas and the wireless carrier's facilities. (CTIA's Reply Comments at 3, R.R. at 208a.)

[12] The DAS Order was adopted on March 2, 2017, but was not entered until March 17, 2017.

provided technological and legal explanations for its conclusion that DAS network operators fall within the exclusion set forth in subsection (2)(iv).

Technologically, the Commission found that DAS networks consist of: (1) a "[p]owered antenna[] and related signal conversion equipment" to receive and transmit end-user wireless traffic and to convert the information (Node); (2) "[s]ome form of 'terrestrial' transport (most likely fiber) that carries the traffic between the DAS and WSP networks"; and (3) a connector "between the two networks, usually located at the WSP's switch or carrier hotel" (Hub). (*Id.* at 11.) The DAS network antennas are located on existing utility poles, municipal light posts, buildings, and other structures frequently in a public right-of-way – but, the Commission explained, DAS network operators can also construct their own poles and facilities.

The Commission found that "DAS networks provide infrastructure on the end-user side of the traditional CMRS carrier's network" by allowing WSPs, which are CMRS carriers and the DAS network's customer, "to expand their networks in a fast, cost-effective, and efficient manner." (*Id.* at 10-11 (quoting ExteNet's Comment at 2).) The Commission recognized that it is the **WSP**, not the DAS network operator, that exchanges the voice traffic to the PSTN and is responsible for the hand-off to 911 emergency centers, with other carriers, or the PSTN. Similarly, phone numbers are a part of the WSP's function and are not needed for the operation of the DAS network. Notwithstanding this, the Commission observed that the DAS networks **are used** to connect the WSP's retail end-user customer with the WSP's network, which, in turn, is connected with the PSTN. (*Id.* at 22.) Thus, technologically, it found a link between the PSTN and the DAS network.

Legally, the Commission cited the Code's statutory language, as well as relevant Federal Regulations and FCC rulings, to determine that DAS network operators were outside the Commission's jurisdiction. Looking at the statutory definitions in the Code, the Commission acknowledged that DAS network operators met the initial legal definition of public utility because they operate "facilities that convey or transmit messages or communications." (*Id.* at 14.) However, the Commission concluded that "DAS networks should be defined by their functionality," and DAS equipment "plays a vital and active role in the wireless session by providing [the] antenna[s] that directly interface[] with the end-user's wireless device" as it both sends and receives the radio signal. (*Id.* at 18.) Focusing on this point and the use of the DAS network equipment, the Commission read subsections (1)(vi) and (2)(iv) together and construed the Code's definition of public utility as excluding "any person that operates equipment that 'furnishes mobile domestic cellular radio telecommunications service.'" (*Id.* (quoting 66 Pa. C.S. § 102).) This definition, according to the Commission, did not require "that the service be a stand-alone offering." (*Id.*) Turning to the dictionary, the Commission observed that to "furnish" means "to provide" or "to supply." (*Id.*) Applying those definitions, the Commission concluded that DAS network facilities **are used** to supply and provide personal wireless services to the WSPs' customers. (*Id.*) Because DAS network operators operate equipment that **is used** to furnish CMRS to the WSPs' customers, the Commission held that they **also furnished** "mobile domestic cellular telecommunications service." 66 Pa. C.S. § 102. Therefore, it concluded, DAS network operators were expressly excluded from the definition of public utility and could not "be certificated as public utilities under the Code." (DAS Order at 23.)

The Commission looked for additional support for this conclusion in the Federal Regulations defining CMRS and in the FCC's rulings related to siting wireless facilities. Noting that DAS network facilities "utilize wireless (radio) technology in order to provide personal wireless service" via the Nodes and Hubs, and provide both a mobile and interconnected service through their relationship with the WSPs and the WSPs' end-user customers, the Commission found DAS networks provided CMRS under the Federal Regulations. (*Id.* at 16, 21-22.) The Commission found further support for its conclusion in the *2014 Wireless Infrastructure Order*, in which the FCC expanded certain siting advantages available to wireless facilities under the Federal Act and prior FCC rulings to DAS facilities "to the extent . . . [those] facilities . . . are or will be used for the provision of personal wireless services." (*Id.* at 15-16 (quoting *2014 Wireless Infrastructure Order* at 12973) (emphasis omitted).) Relying on this statement, the Commission concluded that the FCC classified DAS networks as "a provider of 'personal wireless service'" under federal law, and, therefore, subject to the FCC's regulations. (*Id.* at 16.)

The Commission considered Industry Stakeholders' assertions that DAS networks did not provide "wireless" services and that changing course would lead to adverse consequences to the industry and a violation of federal law, but found them unpersuasive. It was unpersuaded by the suggestion that DAS networks provide landline service, via the use of fiber optic lines. The Commission found this to be "an incomplete description of the DAS network" that was "unreasonably restrictive" because the DAS network's Nodes actively transmit or receive radio frequency (RF) signals from the wireless end-user customer and convert the RF signals to digital or optical format to be transported over the network's fiber optic

lines. (*Id.* at 16-17.) The Commission was similarly unpersuaded by claims regarding the potential adverse impact, observing "that the primary adverse consequence of the possible decertification of DAS networks raised by any party relates **solely** to facilities siting - gaining access to public rights-of-way and zoning permits to deploy new facilities or to connect to existing structures." (*Id.* at 23 (emphasis in original).) It held, however, that because DAS networks were covered by the Federal Act and FCC's rulings related to siting, there are existing provisions guaranteeing DAS network operators the ability to attach their equipment to public utility poles, place equipment in public rights-of-way, and avoid unreasonable zoning restrictions. Finally, the Commission was not persuaded that it was compelled by federal law to issue Certificates to an entity that did not qualify as a public utility under the Code and there would be no violation of federal law because it could not "see how allowing DAS networks to operate free from Commission oversight form[ed]" a competitive barrier to market entry. (*Id.* at 23.)

For these reasons, the Commission held that DAS network operators were not public utilities under the Code and were not entitled to Certificates for the operation of their DAS network facilities. Thus, the Commission declared that: it would no longer issue Certificates to DAS network operators; existing DAS network facilities would not be affected by the DAS Order but Certificates could not be used (and were not needed) to construct new DAS network facilities; and the Commission's staff would review the existing Certificates granted to DAS network operators to determine whether the Certificates should be rescinded. (*Id.* at 35-36.)

Chairman Gladys M. Brown dissented. She observed that for over 20 years, Certificates were granted to CAPs, which have included the wholesale telecommunications transport services provided by DAS network operators. That practice, according to Chairman Brown, should continue regardless of the technological means by which those transport services are provided. She explained that "DAS is the next generation of wholesale transport service needed to offload astronomical increases in the demand for the broadband needed to carry voice calls and access the internet, both of which are telecommunications service[s] under federal law." (DAS Order, Dissenting Statement of Chairman Gladys M. Brown at 2.) Thus, Chairman Brown disagreed with the DAS Order that "any use of wireless technology by any DAS [operator] prohibit[ed] the Commission from granting C[ertificates]." (*Id.* at 1.) Chairman Brown explained that "[t]he Commission must distinguish between the DAS [operators'] common carrier wholesale telecommunications service which relies on fixed wireless technology, which is within the Commission's jurisdiction, from the retail mobile wireless service sold to consumers that is not regulated by the Commission under Section 102." (*Id.*) The DAS operators, she stated, rely partially on wireless technology, but own no spectrum, need no phone numbers, and serve all carriers. This is unlike retail wireless companies, the WSPs, which serve only their own customers, own spectrum, and need phone numbers to operate. Chairman Brown observed that DAS networks provide indirect transport to the PSTN not only to wireless calls, but also to wireline calls and 911 calls. The harm, she asserted, in refusing to grant Certificates to DAS network operators, could not be overstated. The refusal to grant Certificates to these DAS network operators could negatively impact the resolution of conflicts between local municipalities and DAS network

operators, future investment in DAS networks in Pennsylvania, and the ability of neutral DAS network operators to compete. (*Id.* at 2.) According to Chairman Brown, "[c]ontinuing the practice of granting C[ertificates] to DAS [network operators] is more consistent with federal and state law especially in light of [the Commission's] prior practice and overwhelming comments in support of certification." (*Id.* at 1.)

Now-Vice Chairman Andrew G. Place also disagreed. He stated "[t]here is no technical or legal reason to discontinue the past practice of the Commission in granting such applications" so long as the DAS network operator meets "the requisite statutory and regulatory requirements under applicable Pennsylvania and federal law." (DAS Order, Dissenting Statement of Vice Chairman Andrew G. Place at 1.) He concluded that the Commission's current practice of granting Certificates to DAS network operators as telecommunications carriers was consistent with the Federal Act, Pennsylvania law, adjudications, and appellate decisions. (*Id.*) According to Vice Chairman Place, these "actions have facilitated wholesale interconnection arrangements and agreements between competing telecommunications carriers," which have had "beneficial effects for employment, economic development, and new business models." (*Id.* at 2.) Vice Chairman Place noted that DAS network operators' use of technology and architecture "for the wholesale transport of telecommunications and communications traffic does not technically and legally remove them from the Commission's jurisdiction" or transform those operators into WSPs or CMRS providers. (*Id.*) Vice Chairman Place believed there would be negative consequences from ending the practice of certificating DAS network operators that are unsustainable under Pennsylvania and federal law and that would create levels of uncertainty "not conducive to attracting

innovative competitive telecommunications carriers to enter and operate within the Commonwealth." (*Id.* at 5-7.)

Now-Commissioner Coleman issued a statement in support of the DAS Order acknowledging that both sides made reasonable arguments on whether DAS network operators are public utilities. (DAS Order, Statement of Commissioner John F. Coleman, Jr. at 1.) However, Commissioner Coleman ultimately agreed with the DAS Order, concluding that DAS network operators provided a mobile and interconnected service and, as such, were furnishing CMRS, a service that was outside the Commission's jurisdiction. (*Id.*) He recognized the concerns of DAS network operators regarding their access to public rights-of-way and utility poles absent a Certificate, but did not agree that this should result in the continued treatment of those operators as public utilities under the Code. (*Id.* at 2.) Rather, Commissioner Coleman believed the existing siting rules for wireless facilities' infrastructure should provide sufficient protection for the DAS network operators to deploy their facilities effectively. (*Id.*)

Crown Castle and ExteNet filed timely petitions for reconsideration, requesting the Commission to review the DAS Order based on alleged errors of law, overlooked arguments, and new facts. The Commission granted the petitions pending further review and consideration of the merits of the petitions on April 10, 2017. (R.R. at 356a-57a.) After considering their merits, the Commission determined that the petitions did not raise any new arguments in response to the DAS Order, but were seeking another bite at the apple. The Commission disagreed that it overlooked or left unaddressed their prior arguments. Thus, the petitions did not meet the standard for the grant of reconsideration and were denied. Vice Chairman Place dissented, stating that the petitions met the standard for

substantive reconsideration and that the DAS Order should be reversed for the reasons set forth in the petitions.

Crown Castle filed a Petition for Review with this Court on June 2, 2017, seeking judicial review of both the DAS Order and the May 4, 2017 Reconsideration Order. Crown Castle filed an Application for Stay or Supersedeas of the Commission's Orders, which this Court granted on August 29, 2017. Following briefing and oral argument, this matter is ready for disposition.[13]

III. Discussion

A. Parties' Arguments

Crown Castle argues the Commission erred in reversing its decade-long treatment of DAS network providers as public utilities under the Code. It maintains the DAS Order is based on erroneous interpretations of the Code's definition of public utility and is inconsistent with this Court's precedent and other jurisdictions' treatment of DAS networks. Crown Castle asserts the Commission erred in interpreting the Code's definition of public utility as excluding it, and other DAS network operators, because they are not providers of CMRS, but of telecommunications services that fall within the Commission's jurisdiction. Crown Castle claims the Commission's extension of the exclusion set forth in subsection (2)(iv) from a person or corporation that "furnishes mobile domestic

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[13] "[A]ppellate review of an Order of the Commission is limited to[] . . . determining . . . whether[: (1)] a constitutional violation or error in procedure has occurred; (2) the decision is in accordance with the law[;] and (3) the necessary findings of fact are supported by substantial evidence." *PECO Energy Co. v. Pa. Pub. Util. Comm'n*, 791 A.2d 1155, 1160 (Pa. 2002). "With respect to issues of law, our standard of review is de novo and our scope of review is plenary." *Coal. for Affordable Util. Servs. and Energy Efficiency in Pa. v. Pa. Pub. Util. Comm'n*, 120 A.3d 1087, 1095 (Pa. Cmwlth. 2015).

cellular radio telecommunications service," 66 Pa. C.S. § 102, to a person or corporation that owns or operates equipment that facilitates the furnishing of that service goes beyond the clear statutory language and should not be sanctioned by the Court. In particular, Crown Castle argues, the Commission impermissibly added the phrase "**that operates equipment that facilitates**" the furnishing of CMRS to subsection (2)(iv), *id.* (emphasis added), and misinterpreted multiple federal definitions relating to what constitutes CMRS to justify its position.

Moreover, Crown Castle argues, the Commission's change in its longstanding treatment of DAS network operators, which was consistent with that of public utility commissions in other jurisdictions, is based on the Commission's conflation of the services provided by the DAS network operators' **customers**, *i.e.*, the WSPs, with those provided by the DAS **network**. While the WSPs provide CMRS to their end-user cell phone customers, DAS networks provide only underlying transport services via its fiber optic lines to the WSPs, similar to the transport path services found to be valid public utility services in *Rural Telephone*. That the WSPs "incorporate Crown Castle's transport service as a component part of their provision of mobile service does not convert Crown Castle's RF transport service into a mobile service." (Crown Castle's Brief (Br.) at 38.) Crown Castle observes that this Court, in *Rural Telephone*, rejected similar arguments seeking to conflate the services of one entity with the services provided by that entity's customer, and it should do so again here.[14,15]

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[14] Crown Castle provides additional argument on how: certain necessary findings of fact are not supported by substantial evidence; the Commission disregarded the language "otherwise a public utility" in subsection (2)(iv), 66 Pa. C.S. § 102; the DAS Order adversely affects Crown Castle and other DAS network providers; and the DAS Order violates Section 253 of the Federal Act, 47 U.S.C. § 253. However, because of our disposition, we will not address these additional arguments.

The Commission responds that it did not err in concluding that DAS network operators are not public utilities because its interpretation of the Code is reasonable and is consistent with the *2014 Wireless Infrastructure Order* and federal law. Contrary to Crown Castle's contentions, the Commission maintains, its interpretation of subsection (2)(iv) is consistent with the principles of statutory construction and that, as the agency charged with implementing the Code, its expert interpretation of the Code is entitled to great deference. *Popowsky v. Pa. Pub. Util. Comm'n*, 706 A.2d 1197, 1203 (Pa. 1997). While Crown Castle reads subsection (2)(iv) in a restrictive fashion, focusing solely on the word "furnishes" to argue that the Commission erred, the Commission points out that "owning or operating . . . equipment or facilities" is found in the general definition of public utility set forth in subsection (1)(vi). 66 Pa. C.S. § 102. It contends it properly read the two provisions together to reach a reasonable result. Moreover, the Commission argues, the General Assembly could not have meant "for an entity to circumvent the exclusion set forth in [subs]ection (2)(iv) by claiming only to 'facilitate' the furnishing of CMRS with its network to third-party CMRS providers instead of furnishing the CMRS outright itself to retail customers."

(continued...)

[15] ExteNet has intervened in this matter, and in addition to adopting Crown Castle's brief, argues the Commission erred in its interpretation of subsection (2)(iv) by adding language to that provision resulting in an expansion of that section's scope and meaning. It further argues the Commission did not consider whether DAS network operators furnish CMRS, but focused on the utilization of DAS network facilities that are leased by WSPs to furnish CMRS to the WSPs' customers, which is not how the subsection (2)(iv) exclusion is drafted. That a DAS network operator's customer may be furnishing CMRS using leased DAS network facilities does not, ExteNet contends, convert the DAS network operator into a furnisher of CMRS. ExteNet maintains that DAS networks do not and cannot furnish CMRS but do provide, similar to the telecommunications carrier in *Rural Telephone*, point-to-point telecommunications transport services on a wholesale basis to non-utility CMRS providers.

(Commission's (Comm'n) Br. at 22-23.) Because DAS networks are "nothing more than a conduit from a mobile phone user to the CMRS provider's network, thereby extending that mobile wireless network," DAS networks "essentially furnish[] non-jurisdictional mobile domestic cellular radio telecommunications service." (*Id.* at 23.)

Additionally, the Commission maintains its interpretation is consistent with the FCC's rulings that DAS networks, including neutral-host deployments and their facilities, such as the antenna, are personal wireless service facilities. It was on this basis, the Commission asserts, that the FCC extended the siting protections given to wireless facilities to DAS networks in the *2014 Wireless Infrastructure Order*. Moreover, its conclusion that DAS networks provide CMRS is amply supported by the record and by the federal regulations defining CMRS. Here, DAS network facilities accept and transport RF signals from WSPs' retail end-users' mobile devices that will re-connect with the WSP's network, and which will, ultimately, connect with the PSTN. Thus, DAS networks are used to provide a mobile, interconnected service to the public for profit and meet the definition of CMRS.[16]

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[16] Municipal Stakeholders intervened in support of the DAS Order and argue, *inter alia*, that the Commission's interpretation of the Code is entitled to deference because it is not erroneous, but is consistent with the subsection (2)(iv), the Federal Act, and Federal Regulations defining CMRS, the findings of the FCC, and the weight of the evidence. They maintain that the distinction cited by Crown Castle between companies "that furnish" CMRS and companies "that operate equipment" that furnishes CMRS is one without a difference and that it is not possible to "furnish" CMRS without operating equipment that facilitates furnishing that service. They further argue Crown Castle and other DAS network operators do not provide services to the public at large and, therefore, should not be considered public utilities. Additionally, they challenge Crown Castle's assertion that it will suffer adverse consequences from not having its Certificate, pointing to the federal protections for the siting of wireless facilities, which, per the *2014 Wireless Infrastructure Order*, include DAS networks.

In its reply brief, Crown Castle reiterates several of the arguments set forth in its initial brief. It also points out that the Commission recognized in its appellate brief that subsection (2)(iv) is unambiguous[17] and, therefore, Crown Castle asserts, the Commission should have interpreted that subsection in accordance with the language actually used by the General Assembly. Despite this, Crown Castle asserts, the Commission added language to subsection (2)(iv) that focused on the use of equipment owned or operated by DAS network operators, rather than on whether the DAS network operators were themselves furnishing CMRS. Crown Castle claims the Commission's interpretation ignores the actual language the General Assembly used in subsection (2)(iv), conflicts with the General Assembly's intent, and changes the effect of the subsection.

B. Analysis

With these arguments in mind, we turn to the issues before us – whether the Commission's interpretation of the definition of public utility and the exclusion set forth in subsection (2)(iv) of that definition is consistent with the statutory language, this Court's precedent, the treatment of DAS network operators in other jurisdictions, and federal law. We begin by reviewing the statutory language to determine if it supports the Commission's new interpretation.

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[17] Crown Castle quotes the following from the Commission's Brief: "The Petitioners cannot argue that the relevant exclusion set forth in [subs]ection [](2)(iv) of the Code is ambiguous." (Comm'n's Br. at 17.)

i. The Statutory Language

The touchstone of interpreting statutory language "is to ascertain and effectuate the intention of the General Assembly." Section 1921(a) of the Statutory Construction Act of 1972, 1 Pa. C.S. § 1921(a); *Colville v. Allegheny Cty. Ret. Bd.*, 926 A.2d 424, 431 (Pa. 2007). "Every statute shall be construed, if possible, to give effect to all of its provisions." 1 Pa. C.S. § 1921(a). A guiding principle of statutory construction is that, "[w]hen the words of a statute are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit." 1 Pa. C.S. § 1921(b). It is only when the words of the statute are ambiguous or unclear that courts will apply the principles of statutory construction to determine the intent of the General Assembly. 1 Pa. C.S. § 1921(c); *Zane v. Friends Hosp.*, 836 A.2d 25, 31 (Pa. 2003).

"A statute is ambiguous when there are at least two reasonable interpretations of the text under review." *Warrantech Consumer Prods. Servs., Inc. v. Reliance Ins. Co. in Liquidation*, 96 A.3d 346, 354-55 (Pa. 2014). When a statute is ambiguous, we are guided by certain principles, including that courts "have no authority to add or insert language into a statute" and should not, through interpretation, add a requirement that the General Assembly did not include. *Summit Sch., Inc. v. Dep't of Educ.*, 108 A.3d 192, 199 (Pa. Cmwlth. 2015). However, there are times where "[w]ords and phrases which may be necessary to the proper interpretation of a statute . . . may be added in the construction thereof," but not if the added language would "conflict with [the statute's] obvious purpose and intent" or "in any way affect [the statute's] scope and operation." Section 1923(c) of the Statutory Construction Act of 1972, 1 Pa. C.S. § 1923(c).

As in all statutory construction matters, we begin with the relevant statutory language. Section 102 of the Code defines public utility as:

> (1) **Any person or corporations now or hereafter owning or operating** in this Commonwealth **equipment or facilities for:**
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> ***
>
> (vi) **Conveying or transmitting messages or communications,** except as set forth in paragraph (2)(iv), by telephone or telegraph or domestic public land mobile radio service including, but not limited to, point-to-point microwave radio service for the public for compensation.

66 Pa. C.S. § 102 (emphasis added). The Commission found that DAS network operators fall within the general definition of public utility because they operate "facilities that convey or transmit messages or communications." (DAS Order at 14.) However, in subsection (2)(iv), the General Assembly specifically excluded from this definition "**[a]ny person or corporation**, not otherwise a public utility, **who or which furnishes mobile domestic cellular radio telecommunications service**," in other words, furnishes CMRS. 66 Pa. C.S. § 102 (emphasis added).

Here, the Commission construed the Code's statutory language as excluding from its "jurisdiction any person that operates equipment that 'furnishes mobile domestic cellular radio telecommunications service'" and found that DAS network operators operate such equipment. (DAS Order at 18 (quoting subsection (2)(iv)).) The Commission argues this interpretation is entitled to substantial deference because of the highly technical nature of the Code and the Commission's role in implementing the Code. While this level of deferential review is generally applicable to Commission interpretations of the Code, *Dauphin County Industrial Development Authority v. Pennsylvania Public Utility Commission*, 123 A.3d 1124, 1133 (Pa. Cmwlth. 2015), the Commission's interpretation in the DAS Order

deviates from its historical interpretation and application of the Code to DAS network operators and, as such, is not entitled to much deference.

"An administrative agency may revise and correct its prior interpretation of a statute"; but "**it cannot expect that its later interpretation is entitled to very much deference.**" *Id.* at 1135 (emphasis added); *see also Mazza v. Sec'y of Dep't of Health and Human Servs.*, 903 F.2d 953, 958 (3d Cir. 1990) (an agency's interpretation of its statute is entitled to little deference when it is at odds with a prior interpretation). There has been no change in the Code since the Commission began granting Certificates to DAS network operators in 2005. Yet, in 2017, the Commission reversed course and decided, notwithstanding this longstanding practice, that it no longer had jurisdiction because DAS network operators were not public utilities. Given the very recent change in its interpretation of the Code, the Commission's interpretation set forth in the DAS Order is not entitled to much deference. *Dauphin Cty. Indus. Dev. Auth.*, 123 A.3d at 1135; *Mazza*, 903 F.2d at 958.

By its express terms, subsection (2)(iv) excludes from the definition of public utility only a "**person or corporation**, not otherwise a public utility, **who or which furnishes** mobile domestic cellular radio telecommunications service," *i.e.*, CMRS. 66 Pa. C.S. § 102 (emphasis added). Unlike the general definition of public utility in subsection (1), subsection (2)(iv) **does not include** the phrase "owning or operating . . . equipment or facilities." *Id.* Nevertheless, in reaching its conclusion excluding DAS network operators from the definition of public utility, the Commission **added** that language to subsection (2)(iv), thereby expanding the scope of the statutory exclusion. Under the Commission's interpretation, the exclusion now includes not only a person or company that "furnishes" CMRS, but

also any person or company who owns or operates equipment that is used, pursuant to a service agreement, in furnishing CMRS, even if that person or company does not, itself, furnish CMRS. However, **words and phrases may not be added** to a statute **if the addition will "in any way affect its scope and operation.**" 1 Pa. C.S. § 1923(c) (emphasis added). The addition of language is not warranted where the existing statutory text makes sense as it is written and the implied reading of words into that text "change[s] the existing meaning or effect of the actual statutory language." *Pa. Sch. Bds. Ass'n, Inc. v. Pub. Sch. Emps. Ret. Bd.*, 863 A.2d 432, 439 (Pa. 2004). The existing statutory text of subsection (2)(iv), as written, makes sense, and the Commission's implied reading of "that operates equipment" into that text "change[s] the existing meaning or effect of the actual statutory language" by expanding its application to entities that do not fall within the plain language of the statutory exclusion. *Id.*

The Commission maintains that its construction of subsection (2)(iv) is necessary to prevent entities from circumventing the exclusion, a result that the General Assembly must not have intended. However, "where the legislature includes specific language in one section and excludes it from another section, the language may not be implied where excluded" and "the omission of such a provision from a similar section is significant to show a different legislative intent." *Commonwealth v. Mazzetti*, 44 A.3d 58, 67 (Pa. 2012); *see also Popowsky*, 706 A.2d at 1203 (stating "when the legislature includes specific language in one section of a statute and excludes it from another, it should not be implied where excluded") (internal quotation omitted). In drafting the exclusion, the General Assembly chose not to include the broader owner/operator of equipment/facilities language found in subsection (1) in subsection (2)(iv). The

omission of this language in subsection (2)(iv) must be given effect in ascertaining the General Assembly's intent, which the Commission's more expansive interpretation does not do. For these reasons, the Commission's new interpretation of subsection (2)(iv) set forth in the DAS Order is not supported by the statutory language.

ii. This Court's Precedent and the Determinations of Other Jurisdictions

Although we conclude the Commission's new interpretation is not supported by the statutory language, our inquiry is not over because we must also consider whether DAS network operators' services include actually furnishing CMRS. Crown Castle asserts that the Commission's conclusion that DAS network operators furnish CMRS is erroneous because its network cannot furnish (supply or provide) CMRS where it: has no control over the generation of the radio transmissions that are transported via its network; has no license for spectrum to facilitate the radio communication between the Node and the end-user's cell phone – the WSP owns that spectrum; and has no customer relationship with that end-user – who is the WSP's customer. Rather, Crown Castle asserts, it provides transport path service for its WSP customers' wireless communications and such service is a certificated telecommunications service. *Rural Telephone*, 941 A.2d at 758-59. The DAS Order's conflation of the **transport services** DAS network operators provide to their WSP customers with the CMRS **the WSP provides** to its retail end-user cell phone customer, Crown Castle argues, is contrary to this Court's decision in *Rural Telephone* and inconsistent with the determinations of other jurisdictions.

There is no dispute that the WSPs have contracts with their retail cell phone customers whereby the WSPs provide phone numbers and CMRS to those customers or that it is the WSPs that own the spectrum over which those customers' radio signals are transmitted. In contrast, to provide the services offered by DAS network operators, those operators own no spectrum, need no phone numbers, and their contractual relationship is solely with the WSP, not with the retail cell phone user. Furthermore, while the Commission indicated that the DAS network "transmits (or receives) the radio signals to (and from) the wireless end-user customer," (DAS Order at 17), the DAS network operator has no control over the generation of that signal. Until such radio signals are generated by the WSP and its end-user, there is nothing for the DAS network to do. Under these circumstances, it does not appear the DAS network operator can, itself, furnish CMRS. However, in concluding that DAS network operators were not public utilities under subsection (2)(iv), the Commission focused not on whether the DAS networks could **actually furnish** CMRS, but on the fact that DAS networks were used **by the WSP** to furnish **the WSP's CMRS**. In doing so, the Commission conflated the CMRS of the DAS network operators' customers with the transport path services of the DAS network operator. Such conflation, as Crown Castle argues, is contrary to this Court's decision in *Rural Telephone*.

In *Rural Telephone*, Core Communications (Core) sought approval to provide additional connectivity services to internet service providers (ISPs) in new service territories. 941 A.2d at 753. ISPs, among others, contracted with Core for the provision of transmission path services for their internet services. The ISPs were Core's only customers, and Core offered no services directly to the general public. Similar to the arguments that DAS network operators furnish CMRS, the

objectors in *Rural Telephone* argued that Core was a wholesale ISP and granting it a Certificate would give it a competitive advantage over other ISPs. *Id.* at 756, 763. However, this Court held that Core's "transmission path service [was] a telecommunication service under the Code," and that while the "internet service [was] an information service" that did not fall within the Commission's jurisdiction, "the transmission path needed to provide that internet service is a telecommunication service" under state and federal law. *Id.* at 758. Further, consistent with the purpose of encouraging competition, we concluded that Core now had "the ability to provide an alternative transmission path service" allowing its ISP customers to compete with other ISPs in that area. *Id.* at 759. Finally, we noted that, although Core provided services to a limited class of customers, the ISPs, rather than the general public, it still provided a public utility service "for the public."[18] *Id.* at 760.

In the DAS Order, the Commission concluded that the **transport services** provided by DAS network operators were the equivalent of the CMRS provided by the WSPs to their customers. However, pursuant to *Rural Telephone*, DAS network operators' transport service, which conveys or transmits messages or communications to the public for compensation, is a telecommunications service under the Code notwithstanding the fact that the WSPs use it to transmit a service not regulated by the Commission, here CMRS. *Id.* at 758-59. Consistent with *Rural Telephone*, Chairman Brown persuasively explained in her Dissenting Statement that "DAS is a form of wholesale common carrier telecommunications

[18] Thus, the fact that Crown Castle and other neutral-host DAS network operators provide services to WSPs, rather than the general public, does not preclude their status as a public utility. *Rural Telephone*, 941 A.2d at 760.

transport service regardless of the services provided over that connection or the technology or combinations of technologies used to" provide that transport service. (Dissenting Statement of Chairman Brown at 1 (emphasis added).) Thus, like Core in *Rural Telephone*, Crown Castle and other neutral-host DAS network operators offer contractual transport services to their WSP customers that should not, as the Commission did in the DAS Order, be equated to the CMRS offered by the WSP, over which the Commission has no jurisdiction. Yet, the DAS Order does not distinguish between the transport path service, which relies on fixed wireless technology and is otherwise within the Commission's jurisdiction, from the CMRS transported along that path, which the WSPs sell to their customers and is not regulated by the Commission under Section 102 of the Code. As such, the Commission's conclusion that DAS network operators actually furnish CMRS on this basis is inconsistent with *Rural Telephone*.

This reasoning is consistent with that in other jurisdictions, which have recognized that the transport services offered by DAS networks are telecommunications services that are properly certificated as public utilities. For example, the Texas Public Utility Commission (Texas Commission) considered, in 2017, whether ExteNet's DAS network system, which provided transport services for CMRS providers, constituted a wireless service. *Compl. of ExteNet Network Sys., Inc., against the City of Houston for Imposition of Fees for Use of Pub. Right of Way*, PUC Docket No. 45280, SOAH Docket No. 473-16-1861, 2017 WL 2079683, at *4 (Tex. P.U.C. 2017). After holding a formal evidentiary hearing, the Texas Commission determined, based on a similar technical description of the DAS networks here, that ExteNet was providing a telecommunications service, not a CMRS service. *Id.* at *2. The Texas Commission concluded ExteNet did not

provide a wireless or mobile service because, *inter alia*, it: lacked the right to use specific radio spectrum under a FCC license; had no spectrum allocated to its telecommunication services; could not independently provide a radio communication service; does not send or "receive[] any radio communications until activated by ExteNet's CMRS retail customer"; and did not offer CMRS to end-user customers. *Id.* at *4-5. Similar to ExteNet's DAS network in Texas, the DAS networks Crown Castle and other neutral-host DAS network operators own have no spectrum, need no phone numbers to operate, cannot independently provide a radio communication service, and are activated only by the CMRS retail customer.

In California, the California Public Utilities Commission (California Commission) granted NextG Networks of California, Inc. (NextG), a certificate of public convenience "to provide [RF] transport services" by placing "microcells and antennas on existing utility poles" to "augment [wireless] carriers' geographic wireless coverage and improve system capacity." *City and Cty. of San Francisco v. NextG Networks of Cal., Inc.*, Nos. 05-03-010, 06-01-006, 2006 WL 151886, at *1 (Cal. P.U.C. 2006), slip op. at 1 (referencing a prior California Commission order granting that authority to NextG). Denying a challenge to NextG's attempts to attach its network components in public rights-of-way, the California Commission confirmed that NextG had the authority, via its certificate, to provide RF transport services via its network as a telecommunications service. *Id.* at *3-4, slip op. at 3-6. In doing so, the California Commission observed that its decision was consistent with its treatment of services similar to NextG's RF transport services, such as a DAS network service operated by Crown Castle Solutions Corporation and the installation of microwave antennas. *Id.* at *3, slip op. at 6.

Like NextG in California, Crown Castle and other neutral-host DAS network operators in Pennsylvania are providing RF transport services via their networks as a telecommunications service.

We also note that this Court, in *Rural Telephone*, recognized the importance of encouraging competition through the availability of alternative transmission path services. Because Crown Castle and the DAS networks at issue here are neutral-host networks, they provide an alternative transmission path service that transports calls from the customers of multiple WSPs. Their expansion can encourage competition by allowing multiple WSPs to utilize those networks to expand and improve the WSPs' coverage in a particular area. Holding, as the Commission does in the DAS Order, that these DAS networks are not public utilities could hinder the development of "the next generation of wholesale transport service needed to offload astronomical increases in the demand for the broadband needed to carry voice calls and access the internet," as well as to offload "traffic onto fiber networks that, in turn, indirectly connect to the PS[T]N" that can include wireline and 911 calls. (Dissenting Statement of Chairman Brown at 2.) Accordingly, the Commission's change in its treatment of DAS network operators also is inconsistent with *Rural Telephone*'s recognition that competition is encouraged through the certification of providers of wholesale transport services, even if the services being transported do not, themselves, fall within the jurisdiction of the Commission.

For these reasons, it cannot be said that DAS network operators' services include **actually** furnishing CMRS. This Court, in *Rural Telephone*, recognized that the Code treats transmission services as telecommunications services that fall within the Commission's jurisdiction even if they transmit non-jurisdictional

services, and at least two other jurisdictions have found that the provision of RF transport services via a DAS network is a telecommunications service entitled to a certificate of public convenience. While the Commission's prior interpretation of the Code was consistent with these decisions, its new interpretation set forth in the DAS Order is not.

iii. The FCC's *2014 Wireless Infrastructure Order*

Finally, we turn to the Commission's contention that its new interpretation treating DAS network operators as furnishing CMRS is supported by the FCC's *2014 Wireless Infrastructure Order*. In the *2014 Wireless Infrastructure Order*, the FCC explained that certain siting protections set forth in the Federal Act and the FCC's rulings for wireless facilities would apply to DAS facilities, including neutral-host DAS deployments, "to the extent [those facilities] are or will be used for the provision of personal wireless services." *2014 Wireless Infrastructure Order* at 12973. Notably, Section 332(c)(7)(C) of the Federal Act separately defines "personal wireless services" and "personal wireless service facilities" as:

> (i) the term "personal wireless services" means commercial mobile services, unlicensed wireless services, and common carrier wireless exchange access services;
>
> (ii) the term "personal wireless service facilities" means facilities for the provision of personal wireless services; . . . .

47 U.S.C. § 332(c)(7)(C). Thus, the Federal Act distinguishes between "personal wireless services," which includes CMRS, and the facilities that are used to provide "personal wireless services." *Id.* It does not equate the two as both being "personal wireless services." Accordingly, when the FCC extended the siting protections for wireless **facilities** to neutral-host DAS network **facilities** when they

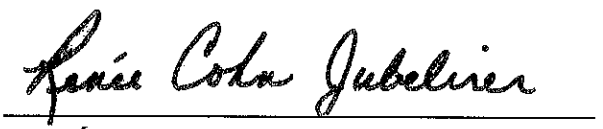
are used to provide personal wireless services, it did not find, as the Commission held in the DAS Order, that the DAS networks, themselves, were providers of personal wireless services.

Moreover, the question before the FCC in the *2014 Wireless Infrastructure Order* was not whether the DAS network operators were providing CMRS, but whether expanding the siting protections to those networks, whose **facilities are used to provide wireless service**, was consistent with the Federal Act, regulations, and the FCC's rulings. This is different from the question before the Commission, which was whether Crown Castle, and other neutral-host DAS network operators, should continue to receive Certificates as providers of telecommunications transport services or whether DAS network operators are "furnishing" CMRS and excluded from the definition of public utility. Unlike Section 332(c)(7)(C) of the Federal Act, which separately addresses "personal wireless services" and "personal wireless service facilities," the exclusion set forth in subsection (2)(iv) applies only to those persons or companies that furnish the CMRS itself and does not, by its terms, address those that operate facilities that are used to provide CMRS that do not, themselves, furnish CMRS. Therefore, we are not persuaded by the Commission's reliance on the *2014 Wireless Infrastructure Order* to support its new interpretation of subsection (2)(iv).

IV. Conclusion

For 10 years, the Commission granted Certificates to DAS network operators as public utilities, which allowed for the continued development and expansion of small cell technology to provide transmission services to support the increasing demand for wireless communications services throughout the

Commonwealth. The Commission's 2017 change in its interpretation was prompted by jurisdictional concerns related to whether those operators were, in actuality, furnishing CMRS regulated by the FCC. However, for the reasons discussed above, the Commission's new interpretation of the Code to exclude DAS network operators from the definition of public utility under subsection (2)(iv) because they furnish CMRS is not supported by the plain language of the Code or the principles of statutory construction, the precedent of this Court, the determinations of public utility commissions in other jurisdictions, or the *2014 Wireless Infrastructure Order*. Accordingly, the Commission's Orders are reversed.



RENÉE COHN JUBELIRER, Judge

Judge Brobson did not participate in the decision in this case.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Crown Castle NG East LLC and Pennsylvania-CLE LLC, Petitioners	:	
v.	:	No. 697 C.D. 2017
Pennsylvania Public Utility Commission, Respondent	:	

ORDER

NOW, June 7, 2018, the March 17, 2017 and May 4, 2017 Orders of the Pennsylvania Public Utility Commission, entered in the above-captioned matter, are **REVERSED**.

Renée Cohn Jubelirer

RENÉE COHN JUBELIRER, Judge